No. 14,653

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF FAIRBANKS, a corporation,
Appellant,

vs.

A. L. KAYE, JEAN KAYE and
JOSEPHINE BOUSSARD,
Appellees.

APPELLEES' BRIEF.

GEORGE B. McNABB, JR.,
131 Lacey Street, Fairbanks, Alaska,
Attorney for Appellees.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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STATEMENT OF THE CASE.

This action was instituted on April 23, 1952, by the filing of a complaint in the U. S. District Court for the District of Alaska, Fourth Division, in the cause entitled:

Bank of Fairbanks, an Alaskan banking corporation,

vs.

A. L. Kaye, Jean Kaye, and Josephine Boussard.

Appellant Bank, by its action, sought to foreclose four real and chattel mortgages on a single parcel of

real property, together with the contents, the mortgages having been executed by Appellees Kaye to secure four promissory notes, payment of each of which notes Appellant alleged to be in default.

Appellee Boussard was joined as a party Defendant by the allegation that: ". . . Josephine Boussard has, or claims to have, some interest or claim upon said premises or some part thereof, as purchaser, mortgagee, judgment creditor, lien claimant, or otherwise . . ." (TR 17).

In separate answers, Appellees admitted the execution of the notes and mortgages as alleged.

In separate affirmative defenses, Appellees alleged the execution of a contract of Purchase and Sale, dated October 9, 1951, wherein Appellees Kaye agreed to sell and Appellee Boussard agreed the buy the mortgaged property subject to the lien of Appellant's mortgages in the then aggregate amount of $15,000. The Contract of Sale (TR 42) provided for the payment of the purchase price in monthly installments of $200 each, plus interest on the unpaid balance of the mortgage notes of 8% per annum, and interest at the rate of 6% per annum on the unpaid balance due from Boussard to Kaye, in the amount of $11,500.

Each Appellee alleged affirmatively that the aforementioned Contract of Sale was executed with the full knowledge and consent of Appellant, that the Contract and a Deed to the mortgaged property were delivered to the Appellant Bank with escrow instructions (TR 49), directing that each installment pay-

ment plus interest be applied to the liquidation of the debt evidenced by the promissory notes and secured by the mortgages sought to be foreclosed by Appellant's complaint.

Appellees, in their separate affirmative defenses alleged in substance that Appellant had agreed and consented to the provisions of the Contract of Sale; had waived foreclosure; had accepted the contract, Deed to the property and the instructions as the subject of an account in Appellant's Escrow Department; had accepted the installment payments and applied same to the liquidation of the mortgage notes as provided by the escrow instructions; that Appellees had relied on the representations and conduct of the agents of Appellant; and that Appellant should be, and was, estopped from claiming right to foreclose.

In reply, Appellant admitted the existence of the Contract of Sale between Appellees Kaye and Boussard, and admitted the acceptance of same into escrow. Appellant denied every other material allegation of each affirmative defense.

Thus, the issues were drawn.

ARGUMENT.

I.

This cause was heard by the Trial Court on the 16th day of August, 1954, or approximately twenty-eight months after the action was instituted. Ralph C. Bailey was called as the first and only witness for Appellant.

Bailey testified that he was then, and for some time had been, the Vice-President of the Appellant Bank of Fairbanks (TR 81).

He further testified, and there was admitted into evidence without objection certain promissory notes executed by the Appellees Kaye as follows:

Plaintiff's Exhibit	Dated	Amount	Payable
C	May 8, 1945	$10,000.00	$ 300 per month
E	Nov. 22, 1948	6,300.00	500 per month
G	Jan. 30, 1950	5,000.00	1,000—Dec. 1, 1950 4,000—Dec. 31, 1950
I	Feb. 3, 1951	5,000.00	Feb. 2, 1952

Mr. Bailey testified that as of August 16, 1954, the following amounts remained due and unpaid (TR 92-93):

	Amount Due	
Exhibit	Principal	Interest
C	$ 546.87	$ 4.49
E	4,100.00	33.71
G	5,000.00	41.11
I	1,150.62	9.45

Mr. Bailey testified further that between May 8, 1945, and June 3, 1949, the principal debt in the amount of $10,000.00 as evidenced by Plaintiff's Exhibit C, had been reduced to $900, and that no payment had been received thereon from June 3, 1949, until February 20, 1954 (TR 94).

Mr. Bailey testified that Plaintiff's Exhibit E (Note in the amount of $6,300, dated November 22, 1948, payable at the rate of $500 per month) was never paid

in accordance with its terms, and that Appellant had never received a $500 principal installment thereon (TR 95).

Bailey further testified that no payment had been received on Plaintiff's Exhibit G (Note in the amount of $5,000, dated January 30, 1950, payable $1,000, December 1st, 1950, and $4,000, December 31, 1950) (TR 97).

The testimony further disclosed that the first payment made on Plaintiff's Exhibit I (Note in the amount of $5,000, dated February 3, 1951, due February 2, 1952) was made on November 9, 1951, and that payments continued regularly on both principal and interest from that date (TR 98).

No payment applicable to principal was ever received on Plaintiff's Exhibit G ($5,000—due $1,000 on December 1st, 1950, and $4,000 December 31st, 1950) (TR 102).

The first payment was received by Appellant on Plaintiff's Exhibit I ($5,000, due February, 1952) on November 9, 1951 (TR 103). Mr. Bailey further testified as follows:

Q. Now let me ask you, Mr. Bailey, I think perhaps I did, let me ask you this, was there not on the 9th day of November, 1951, a total of six hundred forty dollars applied toward the retirement of one or all of these four obligations?

A. It would appear so.

Q. Well, is there any payment on any of these other four on the 9th day of November, other three, I'm sorry?

A. No, there isn't.

Q. Notes "G", "E" and "C", that is Exhibits "C", "G" and 'E" were very badly in default or certainly in default in both principal and interest on November 9, 1951, were they not?

A. That's right.

Mr. Bailey testified further that the Contract of Purchase and Sale between A. L. Kaye and Jean Kaye as sellers, and Josephine Boussard as Buyer, was received by the Appellant Bank as Escrow #691 on October 9, 1951, and that by reason thereof, the Bank received Six Hundred Forty Dollars on November 9, 1951, and that $606.67 was applied toward the reduction of principal, and $33.33 as interest of Plaintiff's Exhibit I (TR 112-113). The payment was made by "presumably Josephine Boussard" (TR 113).

On December 10, 1951, Appellant received $530.50,

On February 11, 1952, Appellant received $304.33, by reason of Escrow #691, and the entirety of the payments was applied toward the payment of Plaintiff's Exhibit I (TR 114).

The testimony concerning the payment on Escrow #691 as received by Appellant on the 10th of March, 1952, is quite enlightening and we quote:

Q. Now then, on March 10th of 1952, you received a payment of Three Hundred Fifty-Two Dollars, seventeen cents, did you not? (44)

A. My records do not indicate that amount of money.

Q. On the 10th day of March, 1952, the same note that we have been talking about, that is Exhibit "I" was credited against principal in the sum of Two Hundred Seventy Dollars, Thirty-Seven Cents, and with interest in the amount of Twenty-Four Dollars, Thirty Cents on the 10th day of March?

A. That's right.

Q. Your escrow records in this transaction 691 indicate I believe on the 10th day of March that a total of three hundred fifty-two dollars seventeen cents was paid?

A. That is correct.

Q. What happened to the other fifty-seven dollars, fifty cents—that amount, Mr. Bailey, if I may interrupt you, that represents interest on Mr. Kaye's equity in the property in the amount of eleven thousand five hundred dollars at the rate of six per cent per annum for one month, does it not?

A. That's right, but what I did with it, that is what I am trying to establish now. Evidently I have not enough material here to establish it.

Q. I will tell you.

A. All right.

Q. Two days later, and on the 12th day of March, 1952, you applied that money against principal on our Exhibit "I", 3-12-52?

A. That's right.

Q. There wasn't any payment made by Josephine Boussard (45) on that date at all, was there?

A. That's right now that you call it to my attention.

Q. So you applied on that date as you had on each previous occasion the interest of Mr. Kaye as it accelerated on his Eleven Thousand Five as is provided by the contract?

A. That's correct.

On April 8, Appellant received $350.84 under Escrow 691 and again applied same to Plaintiff's Exhibit I (TR 116).

On April 23, 1952, Appellant filed this action and on May 10, June 5 and July 11, 1952, it received $349.50, $348.17 and $346.84 respectively. These payments were held by the Appellant until July 21, 1952, at which time $957.82 was applied toward Plaintiff's Exhibit I, and no accounting has yet been made for the balance of $86.69 (TR 118-119).

On November 9, 1951, the day and date upon which Appellee Boussard made the initial installment payment as provided by Escrow #691, Appellees Kaye were indebted to the Appellant in the amount of $15,000 in principal, as represented by four promissory notes, each of which was past due, some since 1948 (TR 120).

Between November 9, 1951, and the trial of this cause, Josephine Boussard paid to Appellant $6,800, i.e., thirty-four installments of $200 each (TR 151) in addition to the sum of $2,749.54, which amount constituted the then accrued interest on Plaintiff's Exhibits C, E, G and I as of the date of payment of each of the aforementioned installments (TR 153).

Appellee Boussard had, in fact, paid to the Appellant, under the terms of the mentioned Contract of Sale, Appellant's Escrow #691, the sum of $11,459.87 between the date of the execution thereof and the date of the trial (TR 156).

The entirety of each payment made by Appellee Boussard between November 9, 1951, and July 9, 1952, in the gross sum of approximately $2,170 was applied directly against the indebtedness of Appellees Kaye by Appellant Bank (TR 189-190). In so applying the funds received by it, Appellant Bank followed the instructions and exercised the authority granted by the Escrow Instructions of Escrow #691 (TR 190).

All of the foregoing substantiates the opinion of Bailey, Vice-President of Appellant Bank, which was expressed as follows (TR 198-199):

Q. (By Mr. McNabb.) Her subsequent conduct in making the payments that she (Josephine Boussard) had been and was at that time an excellent credit risk, is that not true?

A. That is correct.

Q. And you knew that to be true at the time that she made the payments?

A. I felt that way about it, yes.

The testimony of Appellee's witness, Mr. Dworkin, to the effect that he had discussed the terms of the proposed Contract of Sale with Mr. Bailey in advance of the preparation and execution thereof, and that Bailey had, in fact, discussed the preparation of the

contract with an Attorney for the Appellees and had, during the conversation, relayed information which the Appellant Bank desired included in the formal instrument, was not refuted. The testimony of Mr. Bailey in that regard is as follows:

Q. (By Mr. McNabb.) Do you have any present recollection of whether you did talk with Mr. Dworkin concerning the preparation of the contract?

A. We could have. I couldn't say yes or no. I don't remember that part of it. It is hard to remember two and a half years ago.

Q. Do you have any recollection at this time as to whether you discussed with him the attorney who was to prepare the contract?

A. No, I don't remember that.

Q. Do you have any recollection of having called any attorney and given, relayed to any attorney the present unpaid balance of the indebtedness of Mr. Kaye to the Bank?

A. That could have been, but I don't remember.

Q. You could have done that?

A. I could have done it, sure.

Notice and knowledge of the Kaye/Boussard Contract of Sale was not denied by the Appellant Bank. Acquiescence therein and ratification thereof is evidenced by the testimony of Mr. Bailey as follows:

Q. Ralph, you feel like it but I want to know what the truth of the matter is?

A. The truth of the matter, George, we know the truth. Let's get down to basic facts. We know why

they* were put in the account. We know we should have taken them* right away. I (144) am wrong, admittedly. We should have taken them at each time. They were put in this account and went to that account to withdraw those funds to liquidate the note. They should have been there and they weren't.

At the conclusion of the trial, the Court announced: "Well, it is clear to me that the defendant, all of the defendants are entitled to prevail in this case. It is the law involved and which gives the defendant the right to prevail in this case is the law with reference to estoppel, waiver, contract, and a third party contract and novation. All of them we pursued end up by giving such a situation as arises in this case by giving the defendants in this case a right to a verdict in judgment. I hold for the defendants all the way through and against the plaintiff. The attorneys for the defendants are charged with the duty of drawing up findings and conclusions of law and decree. They will do so accordingly."

The first point upon which Appellant relies in seeking to establish error of the Trial Court, and thereby a reversal, is that the Court erred in its Findings of Fact No. XIV (TR 62), the pertinent portions of which Findings Appellant neglected to set out in full in its Brief, and which are as follows ". . . and did make unto said Vice-President of the Bank of Fairbanks a full, fair and complete disclosure of all of the terms, conditions, covenants and provisions *to be*

*Contract payments.

in said contract contained, to which said terms, conditions, covenants and provisions said Vice-President did consent."

Said finding was amply justified by the testimony of Lazar Dworkin (TR 226). Mr. Dworkin testified as follows: ". . . He (Mr. Bailey, the Vice-President of Appellant Bank) called me up and told me he wasn't satisfied with the amount of the payments, so I called him again in the latter part of October and went to great length and he told me, well, it looks like these notes have defaulted, I think we will go along with you, provided you designate the Bank of Fairbanks as the escrow agent and number two, that the payments be made directly to the Bank for the amount equivalent of the unpaid indebtedness (TR 227). He called Mr. Hurley while I was there and furnishd him all the figures in the respective amounts . . ." Mr. Dworkin further testified (TR 227): ". . . After the papers were all executed, I took them in to the Bank. I took them to the Escrow Window, I believe it was Phyllis Gidden, and said, you had better call Mr. Bailey over to the window, this is one of his transactions. He walked over to the Escrow Window, examined the contract and papers and said, call Miss Boussard and let her pick up the escrow book."

Under cross-examination by Mr. Johnson, Mr. Dworkin testified as follows (TR 228):

Q. (By Mr. Johnson.) Isn't it a fact that Mr. Bailey told you specifically that he could not accept the proposal that you had made under any consideration as a full payment of the moneys due on the Kaye notes?

A. That is not a fact, Mr. Johnson.

Mr. Johnson. That's all.

Had the testimony of Mr. Dworkin been untrue, Mr. Bailey being then in Court, could have and should have been recalled to rebut such testimony. Mr. Bailey was recalled, but did not rebut the testimony of Mr. Dworkin (TR 231-236). It should be specifically noted here that the conduct of the Bank from and after the receipt by it in escrow of the Contract of Purchase between A. L. Kaye, Jean Kaye and Josephine Boussard, sustains and confirms in every particular the testimony of Mr. Dworkin.

II.

Appellees have no particular quarrel with the law as enunciated by the Appellant in Section B, but find same either inapplicable to the case at bar, or inadequate in scope. Throughout the trial in the Court below, it was the contention of Appellees that the Appellant Bank had, by its conduct, waived its right to foreclose the mortgages executed by the Appellees Kaye; had, in fact, by its conduct, ratified the Contract of Sale, and was therefore estopped from securing a foreclosure.

In its Brief, Appellant states: ". . . An express waiver is, of course, the voluntary or intentional relinquishment of a known right (56 Am. Jur. Sec. 12, p. 113). To quote further from Am. Jur.:

> "Unless it is under seal, a waiver, to be operative, must be supported by an agreement founded on

a valuable consideration, or the conduct on which a waiver is predicated must be such as to preclude a party from insisting on performance of the contract or a forfeiture of the condition. However, in the latter case, it is not a requisite, as in the case of a technical estoppel, the prejudice result to the party in whose favor the waiver operates." (56 Am. Jur. Sec. 16, p. 116.)

We take the liberty of, again, quoting from Appellant's Brief and the case of *Astrich v. German-American Ins. Co. of N. Y.,* 131 F. 13:

"A Waiver is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble or expense thereby."

We quote further from the opinion:

". . . It (waiver) is essentially a matter of intention though circumstances may sometimes be such that the real intention is immaterial and the question is whether a party is not estopped by conduct evidencing an intention upon which another has acted, to say what his true intention really was. In such cases, the ordinary and well understood doctrine of estoppel by conduct is applicable." (*Astrich v. German-American Ins. Co. of N. Y.,* CCA 3rd 1904, 131 F. 13, 20.)

We turn again to the testimony of Ralph Bailey, Vice-President of Appellant Bank (TR 151-152):

Q. (By Mr. McNabb.) So, have you now ascertained how many Two Hundred Dollar ($200.00) payments have been applied to this contract, Mr. Bailey, since it was placed in your Bank?

A. Well . . . Two Hundred Dollar ($200.00) payments; there is a total of Sixty Eight Hundred Dollars.

Q. Thirty-Four?

A. Thirty-Four payments.

Q. And they have been made each month from the time that the payment, or that contract was placed in escrow in your Bank?

A. That is correct.

In view of the foregoing testimony, how can it, in good conscience, be contended by the Appellant that:

> "the doctrine of estoppel also must fall with the same lack of evidence of reliance by the Appellees on any conduct or statement by any agent of the Appellant Bank in inducing the execution of the contract . . ."

> "The distinction between a contract intentionally assented to, or ratified in fact, and an estoppel to deny the validity of the contract, is very wide. In the former case, the party is bound because he intended to be; in the latter, he is bound notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct unless the law treats him as legally bound." (31 C.J.S. 242, Estoppel, Sec. 60.)

"Prejudice is a necessary element of estoppel, but ratification requires no change of position or prejudice." (*Texas and Pacific C. & O. Co. v. Kirtley,* 288 S.W. 619.)

"However, notwithstanding their capability of being distinguished, ratification and estoppel are closely allied; the legal effect thereof is the same; the abstract difference between them may not render it improper to consolidate them, or to include one in the other, in the concrete consideration of the facts of a particular case; and the terms 'ratification' and 'estoppel in pais' are sometimes used in a way which seems to ignore any distinction between them." (31 C.J.S. 242, Estoppel, Sec. 60.) (See also: LRA 1915A 1024 and LRA 1918C 222.)

For manner of ratification by: (1) Acquiescence, (2) Recognition, (3) Payment of Interest or portion of principal, (4) Retention and use of property, see: LRA 1915 A 1033, et seq.

"While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies or objections to the prejudice of the one misled." (*Baker v. Humphrey,* 101 US 494, 17 L. ed. 1063; 21 C.J. 1240, Estoppel, Sec. 247.)

"A waiver may be created by acts, conduct or declarations insufficient to create a technical estoppel." (*N. Y. Life Ins. Co. v. Dumler,* CCA 5th 1922, 282 F. 969; 14 RCL 1180, 1190.)

"A waiver is comprehensively defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed." (*Division v. Klaess,* 20 N.E. 2d 744, 280 N.Y. 252; 31 C.J.S. 242, Estoppel, Sec. 61.)

"A waiver occurs, takes place, or exists when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something of which the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it; and when once made it cannot be recalled, expunged or revoked, nor can the right waived be reclaimed or regained by revoking the waiver . . . The doctrine of waiver is often difficult of application; and the question of whether waiver is present in any particular case must be decided upon the facts peculiar to that case." (31 C.J.S. 244, Estoppel, Sec. 61.)

"Acquiescence is a species of waiver." (*Frank v. Wilson & Co.,* 9 A 2d 82.)

"Waiver and estoppel or estoppel in pais are closely related; the line of demarcation between them is said to be very slight, since both partake of somewhat the same elements and ask essentially the same relief; and the terms are frequently and loosely used as convertible, especially where waivers implied, and estoppels arising, from conduct are involved, the dividing line being very shadowy in such cases and it being often a difficult question to determine just where the doc-

trine of implied waiver ends and that of estoppel begins." (31 C.J.S. 245, Sec. 61.)

"Waiver is voluntary relinquishment of known right, and may be either express or implied." (*Reynolds v. Travelers Ins. Co.,* 28 P 2d 310.)

" 'Implied waiver' may arise where one party has pursued such a course of conduct as to evidence intention to waive right, or where conduct is inconsistent with any other intention." (*Reynolds v. Travelers Ins. Co.,* 28 P 2d, 310.)

"Waiver by conduct has been recognized many times." (*Beaulaurier v. Washington State Hop Producers,* 111 P. 2d 559, and cases cited at p. 562.)

"Estoppel is preclusion by act or conduct from asserting right which might otherwise have existed, to detriment or prejudice of another who, in reliance on such act or conduct, has acted thereon." (*Reynolds v. Travelers Ins. Co.,* 28 P. 2d 310; *Vernon v. Equitable Life Assurance Society of US,* 129 P. 2d, 801; *Bennett v. Grays Harbor County,* 130 P. 2d 1041-1045; *Strand v. State,* 132 P. 2d 1011; *Tucker v. Brown,* 150 P. 2d, 604.)

" 'Waiver' is *unilateral* and arises by intentional relinquishment of right, or by neglect to insist upon it, while 'estoppel' presupposes some conduct or dealing with another by which other is induced to act or forbear to act." (*Reynolds v. Travelers Ins. Co.,* 28 P. 2d, 310.)

"It is not necessary that an equitable estoppel rest upon a consideration or agreement or legal obligation." (*Rothschild et al. v. Title Guarantee & Trust Co.,* 97 N.E. 879.)

"Waiver is essentially unilateral in its character, it results as a legal consequence from some act or conduct of the party against whom it operates; no act of the party in whose favor it is made is necessary to complete it. It need not be founded upon a new agreement or be supported by a consideration, nor is it essential that it be based upon estoppel." (*Dockery v. Hanan,* 54 S.W. 2d, 1017-1022; *Order of Railway Conductors of America v. Quigley,* 83 S.W. 2d, 701-704.)

On page 14 of Appellant's Brief, it cites in support of its position in *Stoneman Co. v. Briggs* (1933), 110 Fla., 104, 148 So. 556. We quote from Appellant's Brief:

"It was held that an agreement on the part of a mortgagee to refrain from foreclosing his mortgage, and to waive all defaults so long as it received the rents* until the real estate market should be on a sound financial basis, was no defense to foreclosure of the mortgage, since it lacked consideration and was indefinite as to time for performance."

We quote from the Court's opinion:

"The first agreement for forbearance at most was only an agreement to waive defaults then existing and to forbear foreclosure as long as payments were made in accordance with that agreement. The record conclusively shows that the agreement was breached."

A careful perusal of Appellant's Brief leads to the inescapable conclusion that Appellant seeks as an

*Mortgagor assigned rentals and agreed to pay any deficit thereby guaranteeing $1,000 per month to mortgagee.

alternative to foreclosure a personal money judgment against Appellees A. L. Kaye and Jean Kaye; such position is untenable. Obviously, Appellant's action is for the foreclosure of its mortgages.

By the weight of authority, mortgage foreclosure is an action in rem or quasi in rem in those jurisdictions in which such action is considered as being both in rem and in personam, such foreclosure is considered as in rem for the purpose of foreclosing the mortgage lien and *in personam to obtain a personal judgment for the deficiency, if any.* (*In re Ganet Realty Corp.,* 9 F. Supp. 246 DC '35, aff. 83 F 2d, 945, cert. den. 57 SCt, 1217.)

> "Deficiency presupposes foreclosure and sale. A person purchasing subject to a mortgage and agreeing to pay the mortgage liability will not be heard to question the validity of such liability and by thus assuming payment he becomes primarily liable to the holders of the obligations thus assumed." (*City of Santa Cruz v. Wykes,* C.C.A. 9th 202 F., 357-373.)

> "Where one person enters into a contract with another for the express benefit of a third person, such third person may maintain an action for the breach, such a contract is not within the Statute of Frauds. The conveyance of the land is the consideration for the promise and the fact that the consideration moves from the Grantor is a matter of no moment. In such cases, the Grantee becomes the principal Debtor and the Mortgagor a surety." (*Evans v. Sperry,* 12 F. 2d, 438-439.)

> "The promise of a Mortgagor's Grantee to pay the Mortgagee does not relieve Mortgagor but renders him secondarily liable." (*First National*

Bank of Wellston v. Conway Road Estates Co., 94 F. 2d, 736, C.C.A. 8th, 1949.)

"In Texas, as generally elsewhere, the purchaser of property encumbered by a mortgage, who assumes to pay the mortgage as part of the consideration of his purchase as between himself and his Vendor becomes the principal Debtor and the Vendor is surety, the mortgagee may enforce the transaction for his own benefit." (*Pinckney v. Wylie,* C.C.A. 5th, 1936, 86 F. 2d, 541-542.)

"The purchase of land subject to a mortgage does not make the debt personal, but the debt will be charged on the land." (*McLearn v. Wallace,* 35 U.S. 625.)

CONCLUSION.

Appellees contend that the representations and conduct of the officer of Appellant Bank prior, as well as subsequent, to the execution of the Contract of Purchase and Sale between Appellees Kaye and Boussard, constitute a ratification of the provisions thereof.

Unquestionably Appellees relied upon the ratification. Appellees Kaye no longer sought a purchase for the mortgaged property as a means of liquidating their indebtedness and Appellee Boussard made payments at the Appellant Bank in strict compliance with the provisions of the contract.

The injury of Appellees could have been avoided by a simple statement from an agent of Appellant, prior to the execution of the Contract of Purchase and Sale, to the effect that "we intend to foreclose," or "we must be paid in full."

The conduct of Appellant in accepting the escrow and directly applying the payments made as a result thereof to the satisfaction of the mortgage debt is entirely inconsistent with any other honest intention than an intention to waive notice of default, demand for payment and foreclosure—subject, of course, to compliance with the provisions of the Contract of Purchase and Sale.

It is the contention and opinion of Appellees that the undisputed facts of this case constitute a prime and perfect example of the conduct incident to the establishment of waiver and estoppel. Obviously, the testimony was shocking to the conscience of the Trial Court. The Defendants prevailed.

By this appeal, Appellant seeks as an alternative, to reversal of the decision below, the allowance of a money judgment v. Appellees Kaye. This effort, it must be assumed, is motivated by a compelling desire that the Court *tacitly* approve Appellant's conduct which gave rise in this Court to the cause entitled: A. L. Kaye, Appellant, v. Bank of Fairbanks, Appellee, Cause #14,110.

Suffice it to say—if waiver and estoppel there be as regards one Appellee, waiver and estoppel there be to all.

Dated, Fairbanks, Alaska,
July 13, 1955.

Respectfully submitted,
George B. McNabb, Jr.,
Attorney for Appellees.

Service acknowledged by receipt of copy of the foregoing Brief this 13th day of July, 1955.

MAURICE T. JOHNSON,
Attorney for Appellant.

WILLIAM V. BOGGESS,
Attorney for Appellant.